TENGKU DATO' KAMAL IBNI SIR SULTAN ABU BAKAR & ORS v. BURSA MALAYSIA SECURITIES BHD

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
UMI KALTHUM ABDUL MAJID JCA
HASNAH MOHAMMED HASHIM JCA
[CIVIL APPEAL NO: W-02(IM)(NCC)-1394-08-2016]
27 FEBRUARY 2020

CIVIL PROCEDURE: *Committal proceedings – Appeal against – Company breached Listing Requirements of Bursa Malaysia – High Court made orders to give effect to penalties imposed against directors of company – Orders affirmed but varied by Court of Appeal – Directors failed to comply with courts' orders – Order of committal obtained against directors for failure to comply with courts' orders – Whether directors in contempt – Whether there were clear acts of contempt – Rules of Court 2012, O. 52 r. 4*

CIVIL PROCEDURE: *Committal proceedings – Sentence – Company breached Listing Requirements of Bursa Malaysia – High Court made orders to give effect to penalties imposed against directors of company – Orders affirmed but varied by Court of Appeal – Directors failed to comply with courts' orders – Order of committal obtained against directors for failure to comply with courts' orders – Directors sentenced to fine – Whether heavier sentence ought to be meted out – Whether sentence reflected seriousness of offence – Whether custodial sentence more appropriate – Rules of Court 2012, O. 52 r. 4*

The appellants (first, second and fourth defendants ('defendants')), former directors of Cepatwawasan Group Bhd ('Cepatwawasan'), had caused its subsidiary company to make payments of RM16 million to Opti Temasek Sdn Bhd and one Sheikh Abdul Rahim. Having found that the defendants had breached the Listing Requirements of the respondent ('plaintiff') by making such payments, the Listing Committee of the plaintiff imposed penalties against the defendants, pursuant to s. 360(1)(c)(i), (A) and (K) of the Capital Markets and Services Act 2007. The defendants appealed to the plaintiff's Appeals Committee, against the Listing Committee's decision but the appeal was dismissed. This prompted the defendants to file a judicial review at the High Court to challenge the decision of the Appeals Committee. The application was dismissed and the defendants' appeal to the Court of Appeal was unsuccessful. The plaintiff subsequently filed originating summons ('OS') to enforce the penalties imposed by the Listing Committee. The OS was allowed and the High Court ordered (i) the first and second defendants, jointly and severally, to restore Cepatwawasan the RM13 million paid to Opti Temasek Sdn Bhd, within 30 days of the order; and (ii) the defendants,

jointly and severally, to restore Cepatwawasan the RM3 million paid to Sheikh Abdul Rahim ('HC order'). The defendants then appealed to the Court of Appeal, against the HC order, but the appeal was dismissed save for a slight variation that all the payments and acts stated in the HC order shall be carried out within 30 days of the date of the Court of Appeal's order ('COA order'). The defendants' leave to appeal to the Federal Court was dismissed. Since the defendants failed to comply with the COA order, the plaintiff filed a notice of application, at the High Court, for an order of committal against the defendants, pursuant to O. 52 r. 4 of the Rules of Court 2012 ('ROC') ('encl. 48'). The High Court allowed encl. 48 and sentenced (i) the first and second defendants each to a fine of RM2 million to be paid within 90 days, in default of payment, 30 days imprisonment; and (ii) the fourth defendant to a fine of RM100,000 to be paid within 90 days, in default of payment, 14 days imprisonment. Hence, the present appeals by (i) the defendants against the committal order; and (ii) the plaintiff against the sentence imposed.

Held (dismissing appellants' appeal; allowing respondent's appeal)
Per Umi Kalthum Abdul Majid JCA delivering the judgment of the court:

(1) The defendants unabashedly failed to comply with the HC order, as varied by the COA order. The committal proceedings were not the forum for the defendants to challenge the HC and COA orders. The defendants have had the opportunity to do so when they appealed against the said decisions/orders and have exhausted their rights to appeal against the said decisions/orders when the defendants' leave to appeal was dismissed by the Federal Court. Hence, the defendants were estopped from any attempt to re-litigate and re-argue their case on its merits in this appeal. (paras 32 & 33)

(2) To date, and in the absence of any stay order, the HC order, as varied by the COA order, stood as they were. The defendants, despite being fully aware of the terms of the orders, failed to obey the HC and COA orders and failed to carry out the necessary acts within the stipulated time frame provided by the said orders. The lackadaisical and cavalier attitude of the defendants towards the observance of the HC and COA orders, and the absence of any attempt to comply with the said orders were testament to the defendants' disobedience and defiance of the said orders, notwithstanding the ample time given for their compliance. These were clear acts of contempt, as set out under O. 52 r. 4 of the ROC. (para 34)

(3) A heavier sentence must be meted out to reflect the seriousness of the offence committed by the defendants. A custodial sentence was the more appropriate sentence to match the gravity of the offence committed by the appellants. The imposition of fine was neither suitable nor appropriate in the given circumstances of the case. The sentence part of

A the HC order was set aside and substituted with the following orders: (i) the defendants shall comply with the HC order, as affirmed by the COA order, within three months; and (ii) in default of the above, the sentence of imprisonment was imposed on the defendants as the following (a) five years imprisonment from the expiry of the three-
B month period for the first and second defendants, respectively; and (b) one year imprisonment from the expiry of the three month for the fourth defendant, or upon the defendants purging their contempt in accordance with the terms of the HC order, as affirmed by the COA order, whichever earlier. (paras 37 & 39)

C **Case(s) referred to:**
Lee Lim Huat v. Yusuf Khan Ghows Khan & Anor [1997] 3 CLJ 197 CA ***(refd)***
Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal [1993] 3 CLJ 210 SC ***(refd)***

Legislation referred to:
D Capital Markets and Services Act 2007, ss. 11, 21, 360(1)(c)(i), (A), (K)
Rules of Court 2012, O. 52 r. 4

For the appellants - Jasbeer Singh Banta Singh & Nur Hakimah Mohamad; M/s Jasbeer Nur & Lee
For the respondent - Preetha Pillai & Nimalan Devaraja; M/s Skrine

E *[Editor's note: For the High Court judgment, please see Bursa Malaysia Securities Bhd v. Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors [2017] 1 CLJ 81 (varied).]*

Reported by Najib Tamby

JUDGMENT

F **Umi Kalthum Abdul Majid JCA:**

Introduction

[1] The appellants/ the first, second and fourth defendants (collectively referred to as the "defendants") were the former directors of Cepatwawasan
G Group Berhad ("Cepatwawasan"), a company listed on the Main Board of Bursa Malaysia Berhad.

[2] The respondent/plaintiff is Bursa Malaysia Securities Berhad which is a stock exchange licensed under the Capital Markets and Services Act 2007 ("Act 671"). The respondent/plaintiff has, among others, a statutory duty
H under ss. 11 and 21 of the Act to ensure a fair and orderly market for the securities traded through its facilities.

[3] For ease of reference, parties will be referred to as they were in the High Court.

I

[4] The plaintiff had on 28 December 2010 obtained an order from the High Court of Malaya in Kuala Lumpur *vide* Originating Summons No. D-24NCC-168-2010 against the defendants ("High Court Order dated 28 December 2010").

[5] The High Court Order dated 28 December 2010 in the main are as follows:

(i) that within 30 days of the High Court Order, the first and second defendants, jointly and severally, restore to Cepatwawasan the RM13 million paid to Opti Temasek Sdn Bhd; and

(ii) that within 30 days of the High Court Order, the defendants, jointly and severally, restore to Cepatwawasan the RM3 million paid to Sheikh Abdul Rahim.

[6] The defendants (including the third defendant) appealed to this court against the High Court Order dated 28 December 2010 and this court upheld the High Court Order dated 28 December 2010 on 16 August 2012 *vide* Civil Appeal No. W-02-(NCC)-89-2011 ("Court of Appeal Order dated 16 August 2012"), save for the variation that all the payments and acts stated in the order shall be carried out within thirty days of the date of the Court of Appeal Order dated 16 August 2012.

[7] The defendants filed an application to the Federal Court for leave to appeal *vide* Federal Court Civil Application No. 08(i)-702-09-2012. The leave application was dismissed with costs on 28 February 2013.

[8] As the defendants failed to comply with the Court of Appeal Order dated 16 August 2012, on 5 November 2014, the plaintiff, after obtaining leave from the High Court, filed a notice of application for an order of committal against the defendants pursuant to O. 52 r. 4 of the Rules of Court 2012 (ROC) in encl. 48.

[9] Enclosure 48 was heard before the learned High Court Judge and the learned High Court Judge granted the order for committal on 24 March 2016. The matter was then adjourned to another date for parties to submit on the issue of sentencing.

[10] On 1 July 2016, the learned High Court Judge pronounced the sentence against the defendants as follows (the order for committal and sentence collectively referred to as "committal order"):

(i) a fine of RM2 million imposed on the first appellant/first defendant to be paid within 90 days from 1 July 2016 and, in default of payment, 30 days' imprisonment;

(ii) a fine of RM2 million imposed on the second appellant/second defendant to be paid within 90 days from 1 July 2016 and, in default of payment, 30 days' imprisonment; and

(iii) a fine of RM100,000 imposed on the third appellant/fourth defendant to be paid within 90 days from 1 July 2016 and, in default of payment, 14 days' imprisonment.

[11] Aggrieved by the committal order, the defendants filed an appeal to this court (the present appeal) on 26 July 2016.

[12] On 15 September 2016, the plaintiff filed a cross-appeal against the learned High Court Judge's decision dated 1 July 2016 to impose a monetary penalty on the defendants instead of a custodial sentence. We have heard both the appeal and cross-appeal together.

Background Facts

[13] The facts that led to the filing of encl. 48 are as follows. The defendants, who were the directors of Cepatwawasan at the material time, had from 8 July 2004 to 5 August 2004 caused Prolific Yield Sdn Bhd ("Prolific Yield"), a wholly-owned subsidiary of Cepatwawasan, to make payments of RM16 million to a company called Opti Temasek Sdn Bhd and one individual by the name of Sheikh Abdul Rahim.

[14] Such payments were in violation of the provisions of the Listing Requirements of Bursa Malaysia ("listing requirements"), specifically section 16.11(a), a provision relating to financial assistance.

[15] The plaintiff then issued a notice to show cause dated 12 July 2005 against the defendants. On 13 October 2005, the plaintiff's listing committee made a finding that the defendants had breached the listing requirements and the listing committee imposed penalties against the defendants under s. 360(1)(c)(i), (A) and (K) of Act 671. The defendants alleged that they had no knowledge and were never informed of this matter and were only aware of the abovementioned hearing through advertisements in newspapers.

[16] The defendants appealed to the appeals committee of the plaintiff against the decision of the listing committee raising, among others, on the allegations of *sub-judice* due to a pending civil suit in Kuala Lumpur High Court Civil Suit No. D3-22-1168-2004.

[17] On 12 June 2006, after having heard the submissions of the defendants' counsel, the appeals committee dismissed the defendants' appeal.

[18] Subsequently, on 14 June 2006, the defendants filed a judicial review application at the Kuala Lumpur High Court *vide* Judicial Review Application No. R1-25-270-2006 to challenge the decision of the appeals committee.

[19] On 18 January 2010, the Kuala Lumpur High Court dismissed the judicial review application with costs. The defendants appealed to this court against the aforesaid decision and the appeal was also dismissed on 19 March 2013. There was no application for leave to appeal filed at the Federal Court.

[20] The plaintiff subsequently on 26 May 2010 filed Originating Summons No. D-24NCC-168-2010 to enforce the penalties imposed by the listing committee on 13 October 2005 which was later affirmed by the plaintiff's appeals committee on 12 June 2006. The originating summons was allowed with costs on 28 December 2010 ("the High Court Order dated 28 December 2010"). The gist of the High Court Order dated 28 December 2010 are stated in para. [5] above.

[21] The defendants then appealed to this court, which dismissed their appeal and affirmed the High Court Order dated 28 December 2010 save for a slight variation where this court varied the said High Court Order by providing that all the payments and acts stated in the said High Court Order shall be carried out within 30 days of the date of this court's order dated 16 August 2012. The leave application to the Federal Court was dismissed by the Federal Court on 28 February 2013.

[22] Thereafter, the plaintiff then filed encl. 48 application and its outcome as referred to in paras. [8] to [12] above.

The Appeal

[23] The defendants submitted to this court that there was a Civil Suit No. D3-22-1168-2004 filed by Cepatwawasan ("Suit 1168") which the defendants alleged that the plaintiff had full knowledge of.

[24] Suit 1168 was a proceeding against 18 defendants, which includes the defendants in this appeal. Suit 1168 *inter alia* sought for:

(i) the sum of RM16 million from the first to fourth defendants and the 14th to 17th defendants;

(ii) the sum of RM3 million from the fifth to seventh defendants and ninth to 13th defendants;

(iii) the sum of RM4 million from the eighth defendant; and

(iv) interest.

[25] The defendants submitted that the parties, including the defendants, themselves in Suit 1168 had entered into a consent judgment dated 29 October 2010 ("consent judgment") and the salient terms of the consent judgment are as follows:

> (a) The 1st Defendant shall pay to the 1st Plaintiff the sum of RM 3,000,000.00 as full and final settlement of the aforementioned suit ("Suit") and the payment of RM 3,000,000.00 shall be effected in the following manner:

A (i) the 1st Defendant is to pay the sum of RM 1,000,000.00 to the 1st Plaintiff on the 4th November 2010;

(ii) the 1st Defendant is to pay a further sum of RM 2,000,000.00 to the 1st Plaintiff within the period of six (6) months from the date of this consent judgment ("2nd payment).

B (b) The Suit shall be withdrawn by the Plaintiffs against the 1st Defendant to the 18th Defendant with no order as to costs and without liberty to file afresh;

(c) This consent judgment is entered into without any admission of liability on the part of all the Defendants.

C **[26]** The defendants argued that the learned High Court Judge had erred in law and in fact when he failed to consider that Suit 1168 and Originating Summons No. D-24NCC-168-2010 both sought similar reliefs. The fact that the defendants had complied with the terms of the consent judgment made the conviction and the sentencing against the defendants in the committal D proceedings to be wrongful. The defendants went on to suggest that even the committal proceedings itself should not have been allowed in the first place.

[27] The defendants also submitted that the sentence meted out by the learned High Court Judge were excessive and did not commensurate with the nature of the alleged non-compliance of the High Court Order dated E 28 December 2010. The defendants further submitted that the sentence passed by the learned High Court Judge failed to consider that the first defendant is a bankrupt and therefore the amount of RM2 million imposed as fine was excessive and unreasonable.

F **[28]** At the same time, the plaintiff submitted that there has been a non-compliance by the defendants of the High Court Order dated 28 December 2010 and as affirmed and varied by the Court of Appeal Order dated 16 August 2012.

[29] The plaintiff also submitted that the reasons given by the defendants G to justify their non-compliance of the said orders had already been considered and dismissed in the substantive judicial review application and the enforcement proceedings. These alleged reasons or justification, it was submitted, were no answers to the committal proceedings before the High Court. The plaintiff relied on the doctrine of estoppel to stop the defendants H from rehashing the same issues that had been considered and dismissed in the judicial review and enforcement proceedings.

[30] As for the plaintiff's cross-appeal on the sentence passed by the learned High Court Judge, the plaintiff argued that custodial sentence would have been a proper and more appropriate sentence against the defendants as their I disobedience is a continuing act.

Our Decision

[31] The principles of law pertaining to contempt of court had been set out in the Supreme Court decision of *Wee Choo Keong v. MBf Holdings Bhd & Anor and Another Appeal* [1993] 3 CLJ 210; [1993] 2 MLJ 222 as per Abdul Hamid Omar (LP) (as he then was) at p. 212 (CLJ); p. 220 (MLJ):

> Obedience to court order
>
> It is established law that a person against whom an order of court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of court runs the risk of being held in contempt with all its attendant consequences.

[32] It was apparent to us that the defendants have unabashedly failed to comply with the High Court Order dated 28 December 2010 and as varied by the Court of Appeal Order dated 16 August 2012.

[33] The committal proceedings were not the forum for the defendants to challenge the High Court Order dated 28 December 2010 and as varied by the Court of Appeal Order dated 16 August 2012. The defendants have had their opportunity to do so when they appealed against the said decisions/orders and have exhausted their rights to appeal against the said decisions/orders when the defendants' leave to appeal was dismissed by the Federal Court. Hence, the defendants were estopped from any attempt to relitigate and to reargue their case on its merits in this appeal against the said decisions/orders.

[34] To date, and in the absence of any stay order, the High Court Order dated 28 December 2010 and as varied by the Court of Appeal Order dated 16 August 2012 stand as they are. Thus, we were of the view that the defendants, despite being fully aware of the terms of the said orders, had in fact failed to obey the said courts' orders and had failed to carry out the necessary acts within the stipulated time frame provided by the said orders. The lackadaisical and cavalier attitude of the defendants towards the observance of the said courts' orders and the absence of any attempt to comply with the said orders are testament to the defendants' disobedience and defiance of the said courts' orders, notwithstanding the ample time given for their compliance. We were of the view that this was in fact clear acts of contempt as set out under O. 52 r. 4 of the ROC.

[35] In respect of the plaintiff's cross-appeal, we were guided by the decision of this court in *Lee Lim Huat v. Yusuf Khan Ghows Khan & Anor* [1997] 3 CLJ 197; [1997] 2 MLJ 472, as per Gopal Sri Ram (JCA) (as he then was) at p. 214 (CLJ); p. 486 (MLJ):

A … However, it is axiomatic that when it comes to sentence, subject to the questions of policy, each case must be dealt with according to its own facts.

… The sentence passed should, apart from reflecting the gravity of the particular offence, act as a deterrent to would-be violators of injunctions …

B

[36] We were of the view that the defendants were recalcitrant despite having exhausted all the avenues to appeal their case by insisting on relitigating the matter in the contempt proceedings at the High Court as well as before us. Such behaviour showcased a clear contempt of the court's C proceedings and total disregard of the law applicable to them in these proceedings.

[37] Thus, we were of the view that a heavier sentence must be meted out by this court to reflect the seriousness of the offence committed by the defendants. We agreed with the submission of the learned plaintiff's counsel D that a custodial sentence is a more appropriate sentence to match the gravity of the offence committed by the appellants. We viewed the imposition of fine was neither suitable nor appropriate in the given circumstances of the case before us.

Conclusion

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[38] Thus, having given our consideration to all the submissions of parties, we found no merits in the defendants' appeal and therefore we unanimously dismissed the defendants' appeal on the finding of liability of all the defendants by the High Court. We agreed with the findings of the learned F High Court Judge that both the orders of the High Court dated 28 December 2010, as affirmed and varied by the Court of Appeal Order dated 16 August 2012, have not been complied with by the defendants. We therefore affirmed that part of the High Court Order dated 1 July 2016.

[39] In respect of the defendants' appeal against sentence and the plaintiff's G cross-appeal on the same, we found there were merits in the cross-appeal based on our findings as we had referred to earlier and we thereby unanimously allowed the cross-appeal and dismissed the defendants' appeal on the sentence. We therefore set aside that part of the High Court Order dated 1 July 2016 and we substituted it with the following orders:

H (i) the defendants/appellants shall comply with the orders of the High Court dated 28 December 2010, as affirmed and varied by the Court of Appeal Order dated 16 August 2012, within three months from 13 February 2017;

(ii) in default of the above, we imposed the sentence of imprisonment on the I respective defendants/appellants as follows:

(a) for the first defendant/first appellant (Tengku Dato' Kamal Ibni Sir Sultan Abu Bakar), five years imprisonment from the expiry of the three-month period;

(b) for the second defendant/second appellant, (Lt. Kol. Tengku Dato' Kamarul Zaman Ibni Al Marhum Sultan Sir Abu Bakar), five years imprisonment from the expiry of the three-month period;

(c) for the fourth defendant/third appellant (Abdul Rahim bin Sendiri), one year imprisonment from the expiry of the three-month period,

or upon the said defendants/appellants purging their contempt in accordance with the terms of the order of the High Court dated 28 December 2010, as affirmed and varied by the order of the Court of Appeal dated 16 August 2012, whichever is earlier.